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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

NANCY L. GRUENEWALD et al., Plaintiffs and Appellants, v. MELODIE Z. SCOTT, as Trustee, etc., Defendant and Respondent.	E046596 (Super.Ct.No. VCVVS034073) **OPINION**
NANCY L. GRUENEWALD et al., Plaintiffs and Appellants, v. JOHN L. OSBORNE et al., Defendants and Respondents.	E047405

APPEAL from the Superior Court of San Bernardino County. John B. Gibson, Judge. Affirmed.

Thomas W. Gillen for Plaintiffs and Appellants.

Law Offices of Louis A. Stearns and Louis A. Stearns; Horspool & Parker and J. David Horspool for Defendant and Respondent Melodie Z. Scott.

Law Offices of Louis A. Stearns and Louis A. Stearns for Defendants and Respondents Joyce Hartman and Osborne Tank & Supply, Inc.

Gray & Prouty, Malcolm D. Schick, Kelly Cox, and Thomas K. Cox for Defendant and Respondent John Osborne.

"Family quarrels are bitter things. They don't go according to any rules." (Fitzgerald, *Babylon Revisited* (Feb. 21, 1931) Saturday Evening Post, <http://gutenberg.net.au/fsf/babylon-revisited.html> [as of Feb. 22, 2010].)

. . . until the family members go to court. And then rules will be applied, whether they like the results or not.

This is, at bottom, a quarrel among three adult siblings over their deceased father's estate. The siblings have entered into a series of agreements in the hope of resolving their disputes, but those agreements have merely given rise to new disputes.

One of the siblings, Nancy Gruenewald, is the plaintiff in this action, along with her son, Layne Gruenewald. The other two siblings — Joyce Hartman and John Osborne — are defendants. Also named as defendants are the father's corporation, Osborne Tank & Supply, Inc. (the Corporation), and the current trustee of his trust, Melodie Z. Scott.

The trial court sustained demurrers, without leave to amend, to some of the Gruenewalds' claims. It granted summary judgment against the Gruenewalds with respect to others. Finally, the Gruenewalds' remaining claims were heard by a jury, which rejected them all.

The Gruenewalds appeal, seeking to relitigate all of these rulings (and more). In the process, they flout fundamental requirements of appellate practice, including that they furnish an adequate record, that they cite their factual assertions to that record, and that they show prejudice; they challenge jury instructions that they stipulated to and special verdict forms that they drafted. To the extent that their contentions have been preserved, and to the extent that we have been enabled to review them, they lack merit. Hence, we will affirm.

I

FACTUAL BACKGROUND

The following facts are taken from the evidence admitted at the jury trial. We caution that they may differ from the facts shown in connection with the various demurrers, as well as from the facts shown in connection with the various motions for summary judgment.

A. *The Agreement to Sell the Trust's Real Property and the Corporation's Assets to Nancy*.

H.S. Osborne died in July 2000. He was survived by four adult children — Nancy Gruenewald, Joyce Hartman, John Osborne, and Gary Osborne — and by 16 grandchildren.

He had created a living trust (the Trust). After his death, the Trust assets included all of the stock in the Corporation. They also included certain real property in Oro Grande (the Oro Grande property).

According to the terms of the Trust, the income of the Corporation was to go to his children for as long as they (or any of them) lived. Once all of the children were deceased, the Corporation was to be liquidated and distributed among all of his grandchildren then living.

Upon his death, Nancy and Joyce became the trustees of the Trust; John became president of the Corporation.

Various and sundry disputes arose, which need not be recounted here. In the hope of settling these disputes, some of the parties entered into an agreement dated March 5, 2001 (the Agreement). Those parties were: (1) Nancy, in her individual capacity and as cotrustee of the Trust; (2) Joyce, in her capacity as cotrustee of the Trust and as an officer of the Corporation; and (3) John, in his capacity as president of the Corporation.[1]

The Agreement provided that the Trust would sell the Oro Grande property to Nancy for $90,000. It also provided that the Corporation would sell all of its assets to Nancy for an additional $160,000. The Corporation would distribute the $160,000 by paying $10,000 to each of the 16 grandchildren. Finally, the Trust would dissolve the Corporation.

The probate court approved the Agreement. Nancy paid the $90,000, and the Trust duly conveyed the Oro Grande property to her. Nancy also paid the $160,000, and the Corporation turned over at least some of its assets to her. (Whether it turned over all of

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[1] John, in his individual capacity, and Gary Osborne also signed the agreement, but only because they were participating in its mutual release of all claims.

its assets is in dispute, as will be seen below.) Nancy immediately resold both the Oro Grande property and the former assets of the Corporation to her adult son Layne.

B. *The $40,000 Due to Nancy's Children*

(Second and Third Causes of Action).

At that point, however, the probate court threw a spanner in the works — it refused to approve the distribution of the $160,000 to the grandchildren, because that would infringe the rights of any grandchildren not yet born.

The parties agreed that the distribution should go forward anyway; however, each of the children, along with the grandchildren born to him or her, would have to sign an agreement (the Indemnity), holding harmless Nancy, Joyce, the Trust, and the Corporation, as a condition of receiving those grandchildren's shares. In December 2001, at the request of the Trust, the Corporation prepared the necessary indemnity forms. It also cut a check to each grandchild for $10,000. It then made the forms and the checks available to all of the children and grandchildren. In the case of Nancy and her four children, it sent the forms and the checks to Nancy's attorney.

In December 2001, John and Joyce and their children signed their forms and received their checks. Suddenly, however, Nancy and Layne raised a new issue: whether John was really the father of one of his claimed children. They refused to sign the forms unless and until John provided proof of paternity.

At first, Gary, the fourth sibling, refused to sign, because he felt that some of the release language was too broad. In February 2002, however, he withdrew his objection; he and his children signed the forms, and they, too, received their checks.

Meanwhile, also in February 2002, Joyce and Nancy were removed as trustees, and Scott was appointed as the successor trustee.[2] In addition, Joyce and John were removed as officers of the Corporation, and Scott became the president.

In April 2002, Nancy and her four children finally signed and returned the forms. At that point, however, Joyce (like Nancy) was no longer either a trustee or a corporate officer and had no authority to distribute their $40,000. Scott, who *did* have the authority, refused to distribute the $40,000 without an agreement from the grandchildren indemnifying *her* (or an order from the probate court authorizing the distribution). Thus, Nancy's children never received the $40,000.

C. *Missing Corporate Assets*

(First and Fourth Causes of Action).

The Agreement purported to incorporate an "Exhibit A," which was supposed to list all of the Oro Grande property, and an "Exhibit B," which was supposed to list all of the corporate assets.

According to the Gruenewalds, some of the corporate assets listed in Exhibit B were missing and were never delivered to them. However, in March 2001, when the bulk of the corporate assets were delivered to them, they made no such claim. The first time they claimed that there were missing assets was in September 2002, after the dispute over the $40,000 arose.

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[2] Scott is a professional fiduciary and not a member of the family.

According to John, when the Agreement was signed, neither Exhibit A nor Exhibit B was attached. The only copy of the Agreement that is in evidence does not have any Exhibit A. It does have an Exhibit B; however, there is a fax stamp on every page of the Agreement, but no fax stamp on any page of Exhibit B.

John also testified that the only allegedly missing items that he did, in fact, keep actually belonged to him, not to the Corporation.

A number of the allegedly missing items were not listed on an inventory of the corporate assets that had been performed in 2000. Some of them were listed on Layne's personal income tax return, suggesting that he had, in fact, received them. A photo of Nancy taken in October 2001 showed her with one of the supposedly missing items.

As to two of the items (a 2.5 gallon propane bottle and a welder extension cord), the Gruenewalds admitted that they did not actually know who took them; other people had had access to them and could have taken them.

D. *Failure to Disclose Code Violations*

(Fifth Cause of Action).

In 1997, the County of San Bernardino had cited the Oro Grande property for alleged code violations. At the time, both John and Layne had contacted the county about the issue and had managed to satisfy the county's concerns. Layne admitted that he was "fully aware" of the citation at the time.

The fifth cause of action — which was asserted solely by Nancy — alleged that in 2002, the county cited the Oro Grande property again for similar code violations. On that basis, Nancy alleged that John and Joyce were liable to her for fraud because, when the

Corporation sold the Oro Grande property to her, they failed to disclose the 1997 code violations.

II

PROCEDURAL BACKGROUND

A. *Demurrers*.

In April 2004, the Gruenewalds filed this action against Scott, John, Joyce, and the Corporation. The operative complaint asserted the following causes of action against the following defendants:

Number	Nature	Scott	John	Joyce	Corporation
First	Breach of contract (corporate assets)	X	X	X	X
Second	Breach of contract ($40,000)	X	X	X	X
Third	Conversion ($40,000)	X	X	X	X
Fourth	Conversion (corporate assets)		X	X	
Fifth (by Nancy only)	Fraud (Oro Grande property)		X	X	

John and Joyce filed a demurrer to the complaint. Scott joined in the demurrer.

With regard to the first and second causes of action, they argued (among other things) that they "were only officers and directors and/or successor shareholders" of the Corporation and therefore could not be personally liable for the Corporation's breach of the Agreement.

With regard to the fifth cause of action, they argued (among other things) that the complaint did not adequately allege that they had a fiduciary duty of disclosure.

The trial court sustained the demurrer without leave to amend as to the first and second causes of action, but solely as against Joyce and Scott, and not as against John.

It also sustained the demurrer without leave to amend as to the fifth cause of action, but again, solely as against Joyce, and not as against John. It explained: "There's no facts to support the fiduciary relationship."

B. *Motions for Summary Judgment*.

1. *Scott's motion for summary judgment*.

The Gruenewalds filed an amendment to the complaint. It attempted to add new allegations against Scott and Joyce to the first cause of action (and arguably also the second).

Scott then filed a motion for summary judgment.[3]

With regard to the first and second causes of action, Scott argued that the trial court had already sustained her demurrer without leave to amend.

With regard to the third cause of action, she argued (among other things) that the Trust did not allow for any distribution to the grandchildren until all four children were deceased.

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[3] We are using "summary judgment" loosely to encompass both summary judgment on the complaint in its entirety and summary adjudication on an individual cause of action.

In opposition to the motion, the Gruenewalds argued that the trial court had sustained the demurrers as to Scott and Joyce in their individual capacities, but not in their capacities as trustees, so they were free to amend. They also argued that the Agreement authorized the distribution.

The trial court granted the motion. It ruled that the order sustaining the demurrer had already wholly terminated the first and second causes of action as against Scott. It further ruled that Scott had shown, beyond a triable issue of fact, that the third cause of action, as against her, had no merit. Accordingly, it entered a final judgment against the Gruenewalds and in favor of Scott. The Gruenewalds filed a timely notice of appeal (Case No. E046596).

2. *John's motion for summary judgment*.

Meanwhile, John filed two motions for summary judgment — one against Nancy and one against Layne.

The appellate record with respect to these motions is incomplete. We do have most of the motion against Nancy, with the conspicuous exception of John's separate statement. Some declarations and exhibits were submitted in support of both motions, and we do have those. However, documents that were unique to the motion against Layne, such as John's memorandum of points and authorities, have not been included in the appellate record.

In the motion against Nancy, John sought summary judgment on the first and second causes of action on several grounds, including that he was not a party to the

Agreement "as it relates to the sale of land and assets" or "as it relates to the distribution of trust funds." (Capitalization omitted.)

John sought summary judgment on the third cause of action on the ground that Nancy lacked standing to sue for conversion of the $40,000.

In opposition, Nancy argued that John was a party to the Agreement because he had signed it and because he had been the president of the Corporation at the time. Nancy also argued that she had standing to sue for conversion of the $40,000 because she was a party to the Agreement.

The trial court granted John's motions for summary judgment as to the first, second, and third causes of action but denied them as to the fourth and fifth causes of action.[4]

C. *Jury Trial and Judgment.*

There was a jury trial on the remaining causes of action against the remaining defendants. The jury, by special verdicts, found against the Gruenewalds on all causes of action. The trial court entered judgment accordingly.

The following chart summarizes the disposition of the various causes of action:

[4] Joyce, too, filed a motion for summary judgment, which the trial court granted as to the first, second, and fifth causes of action. The parties have not included this motion in the appellate record.

	Scott	Joyce	John	Corporation
First Breach of contract (corporate assets)	Demurrer Summary judgment	Demurrer Summary judgment	Summary judgment	Verdict
Second Breach of contract ($40,000)	Demurrer Summary judgment	Demurrer Summary judgment	Summary judgment	Verdict
Third Conversion ($40,000)	Summary judgment	Verdict	Summary judgment	Verdict
Fourth Conversion (corporate assets)		Verdict	Verdict	
Fifth Fraud		Demurrer Summary judgment	Verdict	

The Gruenewalds filed a timely notice of appeal (Case No. 47405). We consolidated the two appeals.

III

THE FIRST AND SECOND CAUSES OF ACTION: BREACH OF CONTRACT

The first and second causes of action — for breach of contract regarding the corporate assets and the $40,000, respectively — were resolved in favor of Scott and Joyce on demurrer, in favor of John by summary judgment, and in favor of the Corporation by a jury verdict.

Specifically, the jury found that Nancy did not "do all, or substantially all, of the significant things that the contract required her to do[.]" It also found that Layne did not enter into any contract with the Corporation.

We find it most convenient to address the Gruenewalds' contentions regarding each cause of action in reverse chronological order, starting with the jury verdict.

A. *Jury Verdict*.

1. *Jury instructions*.

a. *Instruction regarding excuse*.

The Gruenewalds contend that the trial court misinstructed the jury regarding Nancy's nonperformance as excusing defendants' performance.

They point to the following jury instruction:

"Defendant Osborne Tank and Supply denies that it failed to deliver certain items of personal property to the plaintiff, and claims that on December 14, 2001, that [*sic*] it unconditionally made the funds available to the Gruenewald children, and that Plaintiff Nancy Gruenewald and her four children refused to sign papers, which represented a

receipt of the funds by her children, thus[] excusing the defendant from performing it's [*sic*] obligations under the contract."

The Gruenewalds forfeited this asserted error, either by requesting the challenged instruction or by agreeing that it could be given. The record fails to show who requested it. Absent a showing that the Gruenewalds did *not* request it, we are required to presume that they did and, therefore, that any error was invited. (*Lynch v. Birdwell* (1955) 44 Cal.2d 839, 846-847.) Moreover, the trial court had the parties sort the requested instructions into three piles — instructions that they agreed should be given, instructions that they agreed should *not* be given, and instructions that were disputed. The record fails to show that this instruction went into the "disputed" pile and not the "agreed" pile. For this reason, too, any error was invited.

Separately and alternatively, we also reject this contention on the merits. The Gruenewalds argue that this instruction misstated the facts, because the Corporation did not make the funds available "unconditionally." The instruction, however, it did not purport to state any facts; it merely stated what the Corporation was contending.

When it came time to instruct the jury on the elements of a breach of contract claim, the trial court instructed (correctly) that Nancy had to prove, among other things, that she "did all or substantially all of the significant things that the contract required her to do . . . ." Moreover, even the challenged instruction at least *implied* that performance by the Corporation would *not* be excused unless it *did* make the funds available unconditionally. Accordingly, we perceive no error.

b. *Refusal to instruct on third party beneficiary principles*.

The Gruenewalds contend that the trial court erred with respect to the second cause of action by refusing to instruct the jury on third party beneficiary principles.

The record fails to show that the Gruenewalds in fact requested, or that the trial court in fact refused, a third party beneficiary instruction. The instructions that the trial court refused to give ("Instructions to the Jury Refused" (capitalization omitted)) have not been included in the appellate record.[5] Moreover, the instructions that both sides *agreed* should not be given ("Instructions to the Jury Rejected by Counsel" (capitalization omitted)) likewise have not been included in the appellate record. Thus, even assuming the Gruenewalds did request this instruction, they cannot show that they did not later agree to withdraw it.

A fortiori, the record also fails to show that the Gruenewalds requested the instruction in the proper format. Rule 2.1055 of the California Rules of Court requires that each proposed instruction must "[b]e prepared without any blank lines or unused bracketed portions, so that it can be read directly to the jury." (Cal. Rules of Court, rule 2.1055(c)(3).)

The reporter's transcript indicates that at least some instructions were not prepared properly. According to the Gruenewalds themselves, at least one of the instructions they

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[5] The record does include a document entitled "Jury Instructions Requested by Plaintiff" (capitalization omitted), which lists a third party beneficiary instruction, Judicial Council of California Civil Jury Instructions (CACI) No. 301. It does not appear, however, that this document was ever filed (except belatedly, as an exhibit to a posttrial motion). Accordingly, it fails to show that the Gruenewalds actually requested CACI No. 301.

requested had blanks. Moreover, John's counsel objected to another instruction with blanks that had not been filled in, stating, "[I] have no idea how to respond to it." The trial court agreed: "Exactly. You haven't filled out the form, so I'm not going to give it." For all we can tell, this may have applied equally to the third party beneficiary instruction.

The Gruenewalds argue (without citing any authority) that it was trial court's duty to instruct the jury on "all points of law arising in the case . . . ." Not so. """"In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.' [Citations.]" [Citation.]'" (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131.)

Finally, even assuming the trial court erred, the Gruenewalds cannot show prejudice. (Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 939.) The jury found that Nancy breached the contract. Thus, there is no reasonable possibility that Layne would have recovered as a third party beneficiary.

2. *Special verdict forms.*

The Gruenewalds contend that the special verdict form for Layne's breach of contract claims was erroneous, because it allowed the jury to reject these claims on the sole ground that Layne was not a party to the contract. They argue that he could have recovered as a third party beneficiary. They also argue that he had a breach of contract claim because Nancy had reconveyed the corporate assets to him.

The relevant special verdict form provided:

"1. Did Plaintiff Layne Gruenewald and Defendant Osborne Tank and Supply, Inc., enter into a contract?

"_____ Yes _____ No

"If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form." The jury answered no and accordingly stopped there.

The Gruenewalds forfeited the asserted error by failing to object to the special verdict form at trial. (*Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 131.) It does appear that this form was prepared by counsel for defendants. However, counsel for the Gruenewalds was asked if he objected to it; he said he did not. " . . . 'It would seem . . . intolerable to permit a party to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he may acquiesce in, if favorable, and which he may avoid, if not.'" (*Caminetti v. Pacific Mut. Life Ins. Co. of Cal.* (1943) 22 Cal.2d 386, 392.)

The Gruenewalds cite *Woodcock v. Fontana Scaffolding & Equip. Co.* (1968) 69 Cal.2d 452, which stated: "Frequently, failure to object to the form of a verdict before the jury is discharged has been held to be a waiver of any defect. [Citations.] However, waiver is not automatic, and there are many exceptions. [Citations.] [¶] Waiver is not found where the record indicates that the failure to object was not the result of a desire to reap a 'technical advantage' or engage in a 'litigious strategy.' [Citations.] . . . [W]aiver

is not an issue where a defect is latent and there is no hint of 'litigious strategy.'" (*Id*. at p. 456, fn. 2.)

The asserted defect here, however, was not latent. The Gruenewalds are not claiming that the special verdict form was ambiguous; they are claiming that it was legally erroneous. Both the California Supreme Court and the lower appellate courts have frequently held such errors forfeited by failure to object, without even pausing to consider whether the failure was tactical. (E.g., *Lynch v. Birdwell*, *supra*, 44 Cal.2d at p. 851; *Jensen v. BMW of North America, Inc.*, *supra*, 35 Cal.App.4th at p. 131; *Ateeq v. Najor* (1993) 15 Cal.App.4th 1351, 1359.)

3. *The sufficiency of the evidence*.

The Gruenewalds contend that there was insufficient evidence to support the jury's finding that Nancy breached the relevant contract.

They forfeited this contention by failing to discuss *all* of the relevant evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) They discuss only the evidence that favors their position. Indeed, their brief is wholly lacking in *any* statement of the facts *as shown at trial*. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [appellant's opening brief must provide a summary of "the significant facts"].) Whenever the brief does purport to state facts, they are almost always cited either to the Gruenewalds' own complaint or to their motion for new trial, not to the trial record.[6]

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[6] The Gruenewalds also cite Joyce's declaration in support of her motion for summary judgment. They then claim that the evidence at trial was "not inconsistent with the above statement." At that point — and at that point only — they cite a few pages of the trial transcript.

[footnote continued on next page]

We also reject this contention on the merits. The evidence at trial showed that, in or before December 2001, "[a]ll of the parties" — inferably including Nancy — agreed to the revised distribution plan. This required each child and grandchild to sign the Indemnity as a condition of receiving that grandchild's $10,000.[7] The Corporation performed fully, by tendering the indemnity forms along with the checks. Thus, Nancy was required to perform — by signing the Indemnity — within a reasonable time. (Civ. Code, § 1657.) The jury could properly find that April 2002 was not a reasonable time.

Nancy may be arguing that the tender was not unconditional, because it required her and Layne to sign the Indemnity. This condition, however, was already imposed by the parties' agreement; it was not imposed unilaterally after the fact. (See Civ. Code, §§ 1494, 1498; see also *Walsh v. Walsh* (1940) 42 Cal.App.2d 287, 293.) Indeed, it was *Nancy* who imposed an improper condition — by insisting that John provide proof of paternity. Accordingly, there was sufficient evidence that Nancy did breach the revised distribution agreement.

[footnote continued from previous page]

The record, however, belies their claim. For example, in her declaration, Joyce stated that she did not send the $10,000 checks to Nancy's attorney. The Gruenewalds point to this as proof that they were not required to perform.

At trial, however, Joyce testified, "[W]e even sent the checks over to [Nancy's attorney]'s office . . . ." John likewise so testified.

[7] In this argument, the Gruenewalds rely heavily on a written agreement dated December 14, 2001, and on the supposed fact that Nancy did not sign it until April 2002. At trial, however, there was no evidence of any such document. (See part III.B.2, *post*.)

B. *Summary Judgment.*

1. *The form of the trial court's order.*

Preliminarily, the Gruenewalds contend that the trial court's order granting the motions for summary judgment did not conform to the requirements of Code of Civil Procedure section 437c, subdivision (g), which provides: "Upon the grant of a motion for summary judgment, . . . the court shall, by written or oral order, specify the reasons for its determination. The order shall specifically refer to the evidence . . . which indicates that no triable issue exists."

Assuming, without deciding, that the order was defective, the error was harmless. We review an order granting summary judgment independently. "'"It is the validity of the ruling which is reviewable and not the reasons therefor."' [Citation.]" (*Unisys Corp. v. California Life & Health Ins. Guarantee Assn.* (1998) 63 Cal.App.4th 634, 640.) Accordingly, a trial court's failure to comply with Code of Civil Procedure section 437c, subdivision (g) is virtually never so prejudicial as to require reversal. (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017, 1027; *Angell v. Superior Court* (1999) 73 Cal.App.4th 691, 703 [Fourth Dist., Div. Two].) It was not prejudicial here.

2. *John's personal liability*.

The Gruenewalds contend that the trial court erred by granting summary judgment for John on the first and second causes of action on the theory that John was not a party to the contract.

They forfeited this contention by failing to supply us with an adequate record. The appellants' appendix does not include the motion as against Layne. Even as against

Nancy, it does not include John's separate statement or his request for judicial notice. It includes some but not all of John's exhibits. It also does not include Nancy's response to the separate statement.

"Error must be affirmatively shown. [Citation.] The party appealing has the burden of overcoming the presumption of correctness. For this purpose, it must provide an adequate appellate record demonstrating the alleged error. Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. [Citation.]" (*Defend Bayview Hunters Point Com. v. City and County of San Francisco* (2008) 167 Cal.App.4th 846, 859-860.)

We are aware of California Rules of Court, rule 8.163, which provides, "The reviewing court will presume that the record in an appeal includes all matters material to deciding the issues raised." Here, however, the record manifestly does *not* include all of the material matters. Accordingly, this presumption has been overcome.

Alternatively, on this record, the Gruenewalds have not shown error. The issue is not whether John was a party to the Agreement; it is whether he was the party who was obligated to deliver either the assets of the Corporation or the $40,000. Under the terms of the Agreement — as pleaded in and attached to the complaint — he was not. It was the Corporation, and only the Corporation, that was obligated to deliver the assets. It was the "Seller" that was obligated to distribute the $40,000; admittedly, this was somewhat ambiguous, as the Agreement referred to both the Corporation and the Trust as the "Seller," but clearly it did not refer to *John*. The mere fact that John consented to the overall Agreement does not make him liable for the breach of another party's promise.

The Gruenewalds argue that John was liable as the president of the Corporation. However, it is hornbook law that a corporate officer is not personally liable for the corporation's breach of contract based solely on his or her official position. (E.g., *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1087.) The Gruenewalds cite cases dealing with a corporate officer's liability for his or her participation in the corporation's torts. They are inapplicable to the first and second causes of action, which sounded exclusively in contract. "'The complaint serves to delimit the scope of the issues before the court on a motion for summary judgment [citation], and a party cannot successfully resist summary judgment on a theory not pleaded.' [Citation.]" (*Bosetti v. United States Life Ins. Co. in City of New York* (2009) 175 Cal.App.4th 1208, 1225.)

The Gruenewalds therefore argue that they also alleged a tortious breach of the implied covenant of good faith and fair dealing and that John could be found personally liable for this tort. The trial court, however, had previously granted a motion to strike these allegations. The Gruenewalds do not argue that this was error, and it was not. "'Because the covenant of good faith and fair dealing essentially is a contract term that aims to effectuate the contractual intentions of the parties, "compensation for its breach has almost always been limited to contract rather than tort remedies."' [Citation.] The California Supreme Court 'recognizes only one exception to that general rule: tort remedies are available for a breach of the covenant in cases involving insurance policies.' [Citation.] . . . [¶] Thus, 'with the exception of bad faith insurance cases, a breach of the covenant of good faith and fair dealing permits a recovery solely in contract.' [Citation.]" (*Spinks v. Equity Residential Briarwood Apartments* (2009) 171 Cal.App.4th 1004, 1054.)

Finally, the Gruenewalds argue that, even if John was not the promisor under the original Agreement, he became a promisor under a December 2001 written agreement that modified the original Agreement. There are so many things wrong with this argument, it is hard to know where to begin.

First, the Gruenewalds never raised this argument below in opposition to John's motion for summary judgment. Hence, they forfeited it.

Second, there was no *evidence* of any such written agreement. Indeed, the Gruenewalds do not cite *any* of the evidence submitted on John's motion for summary judgment; instead, they cite their own motion for new trial. That motion, in turn, identified the December 2001 written agreement as trial exhibit Nos. 120 and 121. No such exhibits, however, were introduced (or even marked) at trial, much less in connection with John's motion for summary judgment.[8]

Third and finally, even if we were to accept the Gruenewalds' characterization of the supposed written agreement, it fails to support their position. They quote it as stating that "[t]he Co-Trustees will cause [the Corporation] . . . to distribute $10,000.00 to each of the presently surviving sixteen grandchildren . . . forthwith." The "Co-Trustees," in December 2001, were Nancy and Joyce. Nothing in this language obligates John.

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[8] In their reply brief, in an attempt to fix this problem, the Gruenewalds cite an exhibit that they submitted in opposition to *Joyce's* motion for summary judgment. That exhibit, however, was not before the trial court when it ruled on *John's* motion for summary judgment.

3. *Nancy's standing to bring the second cause of action*.

Nancy contends that the trial court erred by granting summary judgment in favor of John on the second cause of action on the ground that she lacked standing.

The error, if any, was harmless. As we have already held, the trial court properly granted summary judgment in favor of John on this cause of action on other grounds. (See part III.B.2, *ante*.) Nancy was *allowed* to go to trial on this cause of action, as against the Corporation; the jury simply found against her. Accordingly, Nancy cannot show prejudice.

C. *Demurrer.*

The Gruenewalds contend that the trial court erred by sustaining Scott's demurrer to the first and second causes of action on the ground that she was merely an officer of the Corporation and therefore could not be personally liable for its breaches of contract.[9]

As to Nancy, the error was harmless. The jury found that Nancy could not recover against the Corporation for breach of contract because she herself had failed to perform. Thus, even if Nancy had been allowed to go to the jury against Scott on the first cause of action, she would not have recovered. Accordingly, she cannot show prejudice.

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[9] This argument would apply equally to Joyce's demurrer. The Gruenewalds, however, raised it solely in their opening brief in their *first* appeal, from the judgment in favor of Scott. They did not raise it in their opening brief in their *second* appeal, from the judgment in favor of Joyce. Moreover, Joyce has never had an opportunity to respond to it. Accordingly, even if this argument were meritorious, it would not be a reason to reverse the judgment in favor of Joyce.

The error was also harmless as to Layne. After a full trial, the jury found that Layne could not recover against the Corporation for breach of contract because he was not a party to the relevant contract. This reasoning applies equally to Scott.

IV

THE THIRD CAUSE OF ACTION: FOR CONVERSION OF THE $40,000

The third cause of action, for conversion of the $40,000, was resolved in favor of Scott and John by summary judgment and in favor of Joyce and the Corporation by a jury verdict.

Specifically, the jury found that Joyce and the Corporation did not "intentionally prevent . . . Layne . . . from having access to the $10,000 payment being held by [the Corporation] for a significant period of time[.]"

More generally, with respect to both the third (conversion of the $40,000) and fourth (conversion of corporate assets) causes of action, the jury also found that Joyce did not "actually interfere with plaintiffs' ownership or right to possession of plaintiffs' property[.]"

A. *Jury Verdict.*

1. *Instructional error.*

The Gruenewalds contend that the trial court misinstructed the jury regarding conversion. (This argument also applies to the fourth cause of action.)

a. *Additional factual and procedural background.*

Once again (see part III.A.1.b, *ante*), the Gruenewalds cannot show that they requested a conversion instruction.

The trial court directed the parties to discuss all of the instructions and to identify the ones on which they disagreed. In the course of doing so, all of the parties stipulated to use a conversion instruction, based on CACI No. 2100, that John's counsel had drafted. This instruction, as ultimately given to the jury, provided:[10]

"Conversion, [Nancy/Layne]. Plaintiff [Nancy/Layne] claims that [Joyce/John/the Corporation] wrongfully exercised control over [his/her] personal property. To establish this claim Plaintiff [Nancy/Layne] must prove all of the following:

"One: That Plaintiff [Nancy/Layne] had a right to possess items of personal property which formerly were owned by Defendant Osborne Tank and Supply Inc.;

"Two: That [Joyce/John/the Corporation] intentionally took possession of the items of personal property for a significant period of time;

"Three: That Plaintiff [Nancy/Layne] did not consent;

"Four: That Plaintiff [Nancy/Layne] was harmed; and

"Five: That [Joyce/John/the Corporation]'s conduct was a substantial factor in causing Plaintiff [Nancy/Layne]'s harm."

b. *Analysis.*

The Gruenewalds argue that the instruction given was erroneous in two respects: (1) conversion does not require that the defendant intentionally take possession, only that the defendant intentionally interfere with the plaintiff's possession; and (2) the instruction

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10 The trial court actually gave this instruction six times — as to Nancy v. Joyce, Layne v. Joyce, Nancy v. John, Layne v. John, Nancy v. the Corporation, and Layne v. the Corporation. To avoid repetition, we quote it only once, with the relevant parties' names in brackets.

referred to "items of personal property which formerly were owned by" the Corporation, even though the $40,000 had never been owned by the Corporation.

We need not address this contention. The Gruenewalds stipulated that the instruction could be given. Accordingly, even assuming it was erroneous, any error was invited. (*San Francisco Brewing Corp. v. Bowman* (1959) 52 Cal.2d 607, 614-615; *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1090-1091; 7 Witkin, Cal. Procedure (5th ed. 2008) Trial, § 316, p. 369.)

B. *Summary Judgment*.

1. *In favor of Scott*.

The Gruenewalds contend that the trial court erred by granting summary judgment in favor of Scott on the third cause of action.

We may assume, without deciding, that the trial court erred. The Gruenewalds, however, cannot show prejudice. The jury found, in connection with the second cause of action, that the Gruenewalds had no contractual right to the $40,000. It necessarily follows that Scott did not convert this money.

2. *Against Nancy*.

The Gruenewalds contend that the trial court erred by ruling, on John's motion for summary judgment, that Nancy lacked standing to bring the third cause of action.

Ultimately, on the third cause of action, the jury found against Layne. There is no reason to suppose that, even if Nancy had been allowed to proceed as Layne's coplaintiff on the third cause of action, she would have enjoyed a more favorable outcome. Accordingly, the error, if any, was harmless.

V

THE FOURTH CAUSE OF ACTION:

FOR CONVERSION OF CORPORATE ASSETS

The fourth cause of action, for conversion of corporate assets, was asserted solely against Joyce and John. It was resolved in their favor by jury verdicts.

The Gruenewalds contend that the trial court misinstructed the jury regarding conversion. We already rejected this argument in part III.A.1.a, *ante*.

The Gruenewalds also contend that the special verdict forms regarding this cause of action were defective.

A. *Additional Factual and Procedural Background.*

The jury was given no fewer than six special verdict forms dealing with this one cause of action, as follows:

1. "VF 2100-1 Conversion[:] Plaintiff Nancy Gruenewald against Osborne Tank and Supply, Inc.," in which the jury found that Nancy had "a right to possess certain items of personal property formerly owned by [the Corporation]," but the Corporation did not "*intentionally* prevent Nancy . . . from having access to the items of personal property for a significant period of time[.]" (Italics added.)

2. "VF 2100-2 Conversion[:] Plaintiff Layne Gruenewald against Osborne Tank and Supply, Inc.," in which the jury found that Layne had no "right to possess certain items of personal property formerly owned by [the Corporation.]"

3. "VF 2100-3 Conversion[:] Plaintiff Nancy Gruenewald against Joyce Hartman," in which the jury found that Nancy had "a right to possess certain items of

personal property formerly owned by [the Corporation]," but Joyce did not "*intentionally* prevent Nancy . . . from having access to the items of personal property for a significant period of time[.]" (Italics added.)

4. "VF 2100-4 Conversion[:] Plaintiff Layne Gruenewald against Joyce Hartman," in which the jury found that Layne had no "right to possess certain items of personal property formerly owned by [the Corporation.]"

5. "Special Verdict as to Defendant Joyce Hartman," in which the jury found that Joyce did not "actually interfere with plaintiffs' ownership or right to possession of plaintiffs' property[.]" (Capitalization omitted.)

6. "Special Verdict as to Defendant John Osborne," in which the jury found that John did not "actually interfere with plaintiffs' ownership or right to possession of plaintiffs' property[.]" (Capitalization omitted.)

It appears that the first four special verdict forms were prepared by counsel for defendants. Counsel for the Gruenewalds was asked if he objected to them; he said he did not. The Gruenewalds now claim "[i]t was intended" that this same form was to be used, not only with regard to Joyce and the Corporation, but also with regard to John.

The last two special verdict forms were prepared by counsel for the Gruenewalds.

B. *Analysis*.

It does seem that something went wrong with the verdict forms. There were forms for Nancy v. the Corporation and Layne v. the Corporation, even though the Corporation had never even been named as a defendant in the fourth cause of action. Moreover, there was only one form for Nancy and Layne v. John, yet there were *three* forms for Nancy

and Layne v. Joyce. In the end, however, these forms allowed for verdicts as to all of the relevant plaintiffs against all of the relevant defendants.

The Gruenewalds forfeited any error in these special verdict forms by failing to object at trial. Once again (see part III.A.2, *ante*), the asserted defect was not some latent ambiguity. Rather, the Gruenewalds are claiming that the first four forms used legally erroneous language, and the second pair were not supposed to be used at all. These errors should have been apparent, at the latest, by the time the jury was polled.

Alternatively, it appears that the Gruenewalds themselves invited any error. Certainly this is true with respect to the last two forms, which the Gruenewalds' own counsel drafted and submitted. They now claim that this pair of forms "had been removed from consideration, and had been returned to counsel by the court clerk before there was any discussion on jury instructions or verdict forms." However, they do not cite any portion of the record to support this claim; hence, they have forfeited it. (Cal. Rules of Court, rule 8.204(a)(1)(C) [brief must "[s]upport any reference to a matter in the record by a citation"]; *Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 816, fn. 5.)

This is also true with respect to the first four forms. The Gruenewalds now contend that these forms were erroneous because they used the word "intentionally."[11] However, by asserting that "[i]t was intended" that the first four forms were to be used, and by claiming that they withdrew the second pair from consideration, they essentially admit that they agreed to the use of these forms.

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[11] Somewhat bizarrely, they also argue that the single special verdict form regarding John was erroneous because it did *not* use the word "intentionally."

Moreover, even assuming the first four forms were used by mistake, the Gruenewalds do not identify any prejudicial error that resulted from using them. Although the first four forms used the word "intentionally," the second pair did not; rather, they asked whether defendants "actually interfere[d]" with the Gruenewalds' ownership or right to possession. The jury found that defendants did not. This finding is dispositive.

Finally, the Gruenewalds argue — albeit only briefly — that the special verdict in favor of John is not supported by the evidence.[12] They forfeited this argument by failing to state it under a separate heading or subheading, as required. (Cal. Rules of Court, rule 8.204(a)(1)(B); *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 294.) They additionally forfeited it by failing to discuss all of the relevant evidence and by discussing instead only the evidence that favors their position. (See part III.A.3, *ante*.)

This is not to imply that, if not forfeited, it would have merit. Basically, the Gruenewalds argue that the items being conveyed were listed in Exhibit B to the Agreement, and therefore the parol evidence rule precluded John from testifying that he actually owned some of those items. There was ample evidence, however, that Exhibit B was never actually attached to the Agreement.

To get around this obstacle, they claim that the jury found that "both Layne Gruenewald and Nancy Gruenewald had the right to have possession of the listed

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[12] They do not challenge the special verdict in favor of *Joyce*, presumably because they conceded below that they had no evidence that she actually converted any of the supposedly missing items.

property." They conclude that this finding entitled them to judgment in their favor. This misstates the record. Actually, the jury found that Layne had *no* right to possession. Moreover, it found that Nancy had "a right to possess certain items of personal property formerly owned by [the Corporation]. It did *not* find that she had a right to possess the "listed" property. It was undisputed that Nancy had the right to possess *some* corporate assets (and ultimately did). Evidently the jury accepted John's testimony that at least some of the items listed on Exhibit B actually belonged to him.

VI

THE FIFTH CAUSE OF ACTION: FOR FRAUD

The fifth cause of action, for fraud, was asserted solely by Nancy and solely against Joyce and John.

It was resolved in favor of Joyce on demurrer and in favor of John by a jury verdict.

Specifically, the jury found that there were no "facts that materially affected the value or desirability of the Oro Grande Property[.]"

A. *Jury Verdict.*

1. *In limine ruling.*

The Gruenewalds contend that the trial court erred by granting a motion in limine to preclude evidence of code violations in 2002.

a. *Additional factual and procedural background*.

John filed a motion in limine to exclude evidence of code violations in 2002 as irrelevant, because they occurred after June 2001, when Nancy conveyed the land to Layne. The trial court granted the motion.

b. *Analysis*.

The trial court correctly ruled that Nancy was not damaged by the 2002 code violations because she no longer owned the land. Nancy argues that her transfer of the land did not necessarily also transfer any existing cause of action. The flaw in this reasoning is that any cause of action to recover damages for the 2002 code violations did not exist yet; to put it another way, even if it existed, it did not give Nancy a right to recover damages that *Layne* incurred *after* she sold the land.

Nancy also claims that John's counsel misstated relevant facts to the trial court. However, she cites no evidence to support that claim. Her own counsel could have contradicted John's counsel, but he did not.

2. *Exclusion of evidence that defendants failed to produce documents*.

The Gruenewalds contend that the trial court erred by excluding evidence regarding defendants' failure to produce documents relevant to code violations.

a. *Additional factual and procedural background*.

When the Gruenewalds called John to testify, their counsel asked him:

"Q We had sent you a notice requesting that you bring bank records to the court. Did you bring those records to court today?

"A My counsel handled that part of the request on my behalf.

"Q And are you aware of how he handled it?

"[COUNSEL FOR JOHN]: That would be an attorney-client communication.

"THE COURT: Sustained. Also, I fail to see the relevance of this. Sounds like discovery material.

"[COUNSEL FOR THE GRUENEWALDS]: Well, we were asking for the —

"THE COURT: Counsel, you may ask for lots of things, but a trial is not a discovery proceeding. That's to be handled before trial, as you well know.

"[COUNSEL FOR THE GRUENEWALDS]: Yes. But we had asked that they produce them for —

"THE COURT: Counsel.

"[COUNSEL FOR THE GRUENEWALDS]: Yes, sir. Okay."

b. *Analysis.*

The trial court's ruling was correct. The Gruenewalds' remedy was to ask the trial court for evidentiary sanctions, issue sanctions, or even terminating sanctions. (1 Cal. Trial Practice: Civil Procedure During Trial (Cont.Ed.Bar 3d ed. 2009) § 4.54 at p. 179.) Then it would have been up to the trial court — not the jury — to determine whether John had, in fact, failed to produce documents. This would have turned on such issues as whether the notice to produce was in proper form, whether it was properly and timely served, whether John served objections (see Code Civ. Proc., § 1987, subd. (c)), and whether John actually had any of the requested documents — all matters that the trial court was better suited to determine than the jury was.

Even assuming that the jury could have decided this issue, it would have required a "minitrial." Certainly the trial court did not abuse its discretion by precluding the Gruenewalds from litigating these issues before the jury. (Evid. Code, § 352.)

Alternatively, the asserted error is not grounds for reversal because the Gruenewalds cannot show that it was prejudicial. The record fails to establish that the Gruenewalds did actually request any documents or, if they did, that John did actually fail to produce any.

In their reply brief, the Gruenewalds attempt to broaden this contention so as to make it extend to questions put to Joyce (rather than John), as well as to questions about documents pertaining to issues other than code violations. We deem them to have forfeited all such contentions by failing to raise them in their opening brief. (*Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1115.)

3. *Instructional error*.

The Gruenewalds contend that the trial court misinstructed the jury regarding the fifth cause of action.

They forfeited this argument by failing to state it under a separate heading or subheading. (See part V.B, *ante*.)

They also forfeited it by failing to cite the jury instructions that were given. (See *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 [Fourth Dist., Div. Two].) Thus, they have not shown that the instructions that were given did not conform with the law.

Alternatively, the asserted error was harmless. The Gruenewalds appear to be arguing that the jury was not properly instructed about the circumstances under which defendants would have had a duty to disclose facts materially affecting the value of the property. The jury, however, found by special verdict that no such facts existed. A duty to disclose therefore would not have altered the outcome.

4. *Special verdict forms.*

Finally, the Gruenewalds contend that the special verdict form for this cause of action was erroneous.

Yet again, they forfeited this argument by failing to state it under a separate heading or subheading. (See part V.B, *ante*.)

They also forfeited it by failing to tell us what the special verdict form actually said and, thus, by failing to supply any coherent argument as to why it did not conform with the law.

Even if not forfeited, the contention lacks merit. The relevant special verdict form was drafted and submitted by counsel for the Gruenewalds. Accordingly, any such error was invited.

B. *Demurrer.*

The Gruenewalds contend that the trial court erred by sustaining Joyce's demurrer to the fifth cause of action on the theory that the complaint did not adequately allege that she had a fiduciary duty of disclosure. They argue that they did not have to allege that Joyce had a *fiduciary* duty of disclosure, because she had a duty of disclosure as the seller of the Oro Grande property.

Even if the Gruenewalds are correct, they cannot show prejudice. After a full trial, the jury rejected the fifth cause of action as against *John* because it found no undisclosed material facts. Thus, Nancy cannot show that, if she had been allowed to litigate the same cause of action against *Joyce*, she had any reasonable likelihood of prevailing.

VII

DISCOVERY ISSUES

A. *Refusal to Reopen Discovery*.

The Gruenewalds contend that the trial court erred by denying their motion to reopen discovery.[13]

1. *Additional factual and procedural background*.

The original complaint was filed in April 2004.

In November 2006, the trial court set a trial date of February 13, 2007. Accordingly, the discovery cutoff date was January 15, 2007. (Code Civ. Proc., §§ 2016.060, 2024.020, subd. (a).)

On January 19, 2007, at the hearing on an ex parte application by defendants, the parties agreed to continue the trial date to July 17, 2007.[14]

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[13] They raise this contention only with respect to the judgment in favor of John, Joyce, and the Corporation; they do not raise it with respect to the judgment in favor of Scott.

[14] The ex parte application has not been included in the record. It appears, however, that defendants were seeking a continuance so they could depose the Gruenewalds and their expert, who had refused to appear on dates to which they had previously agreed. Counsel for the Gruenewalds agreed to extend the cutoff for these depositions; in return, counsel for defendants agreed to extend the cutoff for a defense

[footnote continued on next page]

On February 2, 2007, the Gruenewalds filed a motion to reopen discovery. It included their counsel's declaration to the effect that he had done a "meet and confer" with defendants' counsel. Otherwise, however, it was not supported by any evidence.

The memorandum of points and authorities stated (albeit without any evidentiary support) that defendants had produced documents "[l]ast year." It had taken "a very long time" to copy these documents. "Upon review of said documents, Plaintiffs need to conduct the deposition of Defendants."

Defendants filed a written opposition to the motion. Like the motion, the opposition was not supported by any evidence. It stated, however, that the Gruenewalds had not propounded any written discovery until April 2006 and had not noticed any depositions until December 2006.

On February 27, 2007, the trial court denied the motion. It explained: "I have the authority, but do I have any grounds? And you've given me none. There is nothing in these pleadings that would give me a reason to reopen this discovery. There's no showing of lack of [*sic*] due dil[i]g[e]nce. There's no showing of necessity."

2. *Analysis.*

Discovery ordinarily must be completed 30 days before the initial trial date. (Code Civ. Proc., § 2024.020, subd. (a); cf. Code Civ. Proc., § 2024.030 [expert discovery].) "[A] continuance or postponement of the trial date does not operate to reopen discovery

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[footnote continued from previous page]
expert's deposition. However, he refused to agree to extend the cutoff for defendants' *own* depositions.

proceedings." (Code Civ. Proc., § 2024.020, subd. (b).) However, "[o]n motion of any party, the court may grant leave to complete discovery proceedings . . . closer to the initial trial date, or to reopen discovery after a new trial date has been set." (Code Civ. Proc., § 2025.050, subd. (a).) In ruling on such a motion, the trial court exercises its discretion. (Code Civ. Proc., § 2025.050, subd. (b).) Unless the trial court abused its discretion, we must affirm.

We perceive no such abuse. As the trial court explained, the motion failed to explain why the Gruenewalds had waited two and a half years before noticing defendants' depositions.

In this appeal, the Gruenewalds rely on numerous facts that simply were not before the trial court when it ruled; they have been cobbled together from declarations filed in support of other motions. The Gruenewalds also rely on various asserted "facts" that have not been cited to the record. They claim they "believ[ed] that the past history . . . was . . . known to the court . . . ." That did not relieve them of their burden of producing evidence. Except as otherwise provided by statute, the Evidence Code applies to every evidentiary hearing in a state court. (Evid. Code, § 300; *Jauregi v. Superior Court* (1999) 72 Cal.App.4th 931, 939.) Even assuming the trial court *could* have decided the motion based on matters that it happened to remember, it was not *required* to do so. And finally, when the trial court specifically stated that it was denying the motion because the Gruenewalds had not shown necessity or due diligence, their counsel *still* did not mention any of these asserted facts.

The Gruenewalds complain that the trial court set the trial date "unexpectedly." However, they cite nothing in record showing that there was anything unexpected about it. Certainly they did not claim this at the time.

The Gruenewalds also complain that they were "blindsided" by defendants' opposition to the motion, which allegedly contained "a distorted review of the discovery history . . . ." Nevertheless, they did not file a reply, nor did they make any such claim at the hearing on the motion.

B. *Refusal to Continue or to Deny the Summary Judgment Motions*.

The Gruenewalds contend that the trial court erred by refusing to continue or to deny the motions for summary judgment so they could take more discovery.

1. *Additional factual and procedural background.*

Scott, John, and Joyce all filed their respective motions for summary judgment after the discovery cutoff and after the trial court had already denied the Gruenewalds' motion to reopen discovery (see part VII.A, *ante*).

The Gruenewalds filed a "Request for Relief Re All Defense Motions for Summary Judgment." (Capitalization omitted.) In it, they asked the trial court for leave: (1) to take the depositions of Scott, John, and Joyce, and (2) "to file a petition requiring the County Code Department to disclose information re complaints filed . . . against plaintiff." They also asked the trial court either to continue or to deny the pending motions for summary judgment until they could obtain the requested discovery.

This request was supported by a declaration by the Gruenewalds' counsel, in which he stated, "Evidence is not in our possession, but I believe it can be obtained as to

the following . . . ." He then listed some 16 issues, such as "what happened to the equipment" and "damages."

Meanwhile, in responding to certain facts in defendants' separate statements, the Gruenewalds claimed they could not dispute those facts because the trial court had not allowed them to conduct the necessary discovery.

The trial court denied the request to reopen discovery, and it refused to continue or deny the motions for summary judgment. It explained, "There was no reason why discovery wasn't conducted . . . ."

2. *Analysis.*

Code of Civil Procedure section 437c, subdivision (h), as relevant here, provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just. The application to continue the motion to obtain necessary discovery may also be made by ex parte motion at any time on or before the date the opposition response to the motion is due."

"We apply an abuse of discretion standard of review to the trial court's decision not to continue a summary judgment motion for the purpose of allowing further discovery. [Citation.]" (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270.)

It is not an abuse of discretion to refuse to continue a summary judgment hearing when it would not be possible to complete the requested discovery before the cutoff. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 596-597.) A fortiori, it is not an abuse of discretion to do so after the discovery cutoff has already passed.

Once again (see part VII.A, *ante*), the Gruenewalds did not show good cause to reopen discovery. In particular, they did not show diligence. They argue that continuance under Code of Civil Procedure section 437c, subdivision (h) cannot be denied based on lack of diligence. (See *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 397-400.) This is a minority view; most Courts of Appeal that have considered the issue have held that a showing of diligence *is* required. (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 255-257, and cases cited.) In any event, even assuming this is the law in an ordinary case, it is *not* the law when a continuance would be pointless unless discovery is also reopened, which *does* require a showing of diligence.

VIII

SCOTT'S COSTS AND ATTORNEY FEES

Finally, the Gruenewalds contend that they were deprived of an opportunity to file an opposition to Scott's requests for costs and attorney fees.

Preliminarily, they have forfeited this contention by failing to support it with any citations to the record whatsoever. (See part V.B, *ante*.) We address it on the merits solely as an alternative ground for rejecting it.

A. *Additional Factual and Procedural Background.*

On June 23, 2008, the trial court entered two written orders granting Scott's motion for summary judgment (one as to Nancy and one as to Layne). They were captioned, in pertinent part, "Order and Judgment . . . ." (Capitalization omitted.) They provided, "As to Scott's motion for summary judgment, it is hereby ordered that said motion is granted, and judgment shall be entered forthwith as requested in said motion . . . ." (Capitalization omitted.)

On July 9, 2008, Scott filed a memorandum of costs and a motion for attorney fees. The fee motion was set for hearing on August 26, 2008.

On July 15, 2008, Scott submitted a proposed judgment. Evidently, there was some kind of problem with it, however, as she submitted a proposed judgment again on August 4, and yet again on August 7.

The Gruenewalds did not file any opposition to the fee motion.[15]

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[15] The Gruenewalds have made wildly conflicting assertions about this opposition.

In the trial court, their counsel stated (under penalty of perjury) that he had filed it.

The Gruenewalds included a copy of the opposition in the appellants' appendix, thus at least implicitly representing that it had been filed.

In their opening brief, however, they claimed that they "did not *prepare and file* [an] opposition . . . ." (Italics added.) Scott understandably pointed out that the opposition had been included in the appellant's appendix and asked rhetorically, "Is this writer missing something???"

The Gruenewalds' reply brief then stated that the opposition *was* filed.

Most recently, however, the Gruenewalds represented to us that it was *not* filed.

[footnote continued on next page]

On August 26, 2008, the trial court held a hearing on the fee motion. It began by suggesting that the motion was premature because a judgment had not yet been filed. Scott's counsel took the position that the June 2008 orders granting the motion for summary judgment had started the clock running to move for costs and attorney fees. However, he also noted that he had since submitted a proposed judgment.

The trial court remarked that the proposed judgment had been "filed" (i.e., submitted) in July. Counsel for the Gruenewalds evidently took this to mean that the proposed judgment had been *signed and entered* in July. Thus, he did not argue that the motion was premature. He did argue that the probate court had exclusive jurisdiction. He also argued that the fees sought were excessive. The trial court granted the motion; it awarded Scott $45,654.50 in attorney fees and $5,918.15 in costs.

Also on August 26, 2008, the trial court entered judgment in favor of Scott and against the Gruenewalds. The judgment included the award of attorney fees and costs.

On August 29, 2008, the Gruenewalds presented an ex parte application to vacate the judgment. In it, their counsel claimed that Scott's counsel had falsely informed him that the proposed judgment had been entered.

The trial court ruled that the June 2008 orders granting the motion for summary judgment were in fact a judgment. It therefore denied the application.

[footnote continued from previous page]

According to the register of actions, the opposition was not filed. The Gruenewalds have never produced a file-stamped copy. We therefore deem it established that *it was not filed*.

B. *Analysis*.

The Gruenewalds contend, as they did below, that under rule 3.1700 of the California Rules of Court,[16] a memorandum of costs cannot be filed until judgment has been entered.[17]

In response, Scott once again argues that the June 2008 orders granting the motion for summary judgment *were* a judgment. Not so. " . . . 'It is not the form of the decree but the substance and effect of the adjudication which is determinative.'" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 698.) The orders merely provided, "judgment shall be entered forthwith . . . ." Thus, they expressly contemplated the subsequent entry of a separate judgment. Counsel for Scott was obviously well aware of this, as he in fact submitted a proposed judgment.[18]

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[16] This rule provides: "A prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of mailing of the notice of entry of judgment or dismissal by the clerk . . . or the date of service of written notice of entry of judgment or dismissal, or within 180 days after entry of judgment, whichever is first." (Cal. Rules of Court, rule 3.1700(a)(1).)

It also provides: "Any notice of motion to strike or to tax costs must be served and filed 15 days after service of the cost memorandum." (Cal. Rules of Court, rule 3.1700(b)(1).)

[17] They never really explain why the fee motion — as distinct from the memorandum of costs — was supposedly premature.

[18] Indeed, we question whether Scott is asserting this in good faith. If she really believed this, then presumably she would also believe that the Gruenewalds' notice of appeal — filed more than 60 days after Scott served notice of entry of the June 2008 orders — was untimely. (See Cal. Rules of Court, rule 8.104(a)(2).) Needless to say, she has never actually taken this position.

We therefore assume, without deciding, that the memorandum of costs was premature. Even if so, yet again, the Gruenewalds cannot show prejudice. "[T]ime limitations pertaining to a memorandum of costs are not jurisdictional [citation], and the premature filing of a memorandum of costs is treated as 'a mere irregularity at best' that does not constitute reversible error absent a showing of prejudice. [Citations.]" (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 880.) Here, if the trial court had denied fees and costs on this ground, Scott would have simply refiled her memorandum of costs and her fee motion, and the trial court would have granted them.

The Gruenewalds respond that they *were* prejudiced. They reason that (1) a memorandum of costs cannot be filed until after entry of judgment; (2) a motion to tax costs must be filed within 15 days after the memorandum of costs; and therefore (3) they were entitled to file a motion to tax costs until 15 days after *entry of judgment*. They conclude that they were deprived of their full time to move to tax costs.

The record, however, demonstrates that the additional time would have availed them nothing. *Their counsel mistakenly believed that a judgment had already been entered*. Even so, he did not file a motion to tax costs. Assuming he did not form this belief until the hearing on August 26, he could still have requested an extension of the Gruenewalds' time to file such a motion. (Cal. Rules of Court, rule 3.1700(b)(3).) He did not.[19]

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[19] In their reply brief, the Gruenewalds claim that they asked the trial court to give them until 15 days after mailing of notice of entry of judgment to object to the costs and fees. The record belies this claim.

The Gruenewalds knew that Scott had filed a motion for attorney fees. They had ample time to file an opposition to that motion, and they in fact prepared such an opposition. They have never satisfactorily explained their failure to file it. In any event, their counsel appeared at the hearing on the motion and argued against it on the merits. They have not shown that there was any argument that they were unable to raise.

We conclude that the asserted error was harmless.

IX

DISPOSITION

The judgments are affirmed. Scott, John, Joyce, and the Corporation are awarded costs on appeal against the Gruenewalds.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

RAMIREZ
P.J.

MILLER
J.